No. 15,394

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellant,

vs.

KURT RIETMANN,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLEE.

ARTHUR J. PHELAN,
MILTON T. SIMMONS,
1210 Mills Tower, San Francisco 4, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 15,394

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,	*Appellant,*
VS.	
KURT RIETMANN,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts in this case are not in dispute and are clearly stated in the order of the Court below and in appellant's brief. The appellee, a citizen of Switzerland, was admitted to the United States for permanent residence on July 1, 1949. In 1951 he obtained relief from military service in the United States armed forces on the ground of alienage, thereby making himself ineligible for citizenship (8 U.S.C. 1182 (a)(22)).

The sole issue before this Court is whether the "Savings Clause" (Sect. 405(a) of the 1952 Act (8 U.S.C. 1101 footnote) saves to the appellee the right to reenter the United States as a returning resident, notwithstanding ineligibility to citizenship.

STATUTES INVOLVED.

Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.):

"Section 101. (a) (8 U.S.C. 1101(19) (27).

(19) The term 'ineligible to citizenship', when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

* * * * * * *

(27) The term 'non quota immigrant' means—

* * * * * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; * * *"

"Section 212. (a) (8 U.S.C. 1182 (a))

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to

receive visas and shall be excluded from admission into the United States:

* * * * * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;"

Section 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1426:

"(a) Notwithstanding the provisions of Section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces * * * on the ground that he is an alien, and is or was relieved or discharged from such training on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System * * * shall be conclusive as to whether an alien was relieved * * * from such liability for training or service because he was an alien."

Section 405(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1101 Footnote:

"Savings Clause

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein,

shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa * * *"

Section 4 of the Immigration Act of 1924, 8 U.S.C. Sec. 204:

"When used in this Act the term "nonquota immigrant" means—

* * * (b) an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; * * *"

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. Sec. 213(c):

"No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *."

Section 3(a) of the Selective Training and Service Act of 1940, 55 Stat. 844, 845:

"Except as otherwise provided in this Act, every male citizen of the United States and every other male person residing in the United States, who is between the ages of twenty and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *provided,* that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application "to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 604-606:

"(a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to Section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable

or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

SUMMARY OF ARGUMENT.

Section 13(c) of the 1924 Act, (8 U.S.C. 213(c)) which was in effect until December 1952, permitted aliens ineligible to citizenship who were permanent residents of the United States to depart and reenter (if otherwise admissible), notwithstanding such ineligibility to citizenship. The appellee had such a nonexcludable status so far as ineligibility to citizenship was concerned. This status was preserved to him by the "Savings Clause," Sec. 405(a) of the Immigration and Nationality Act of 1952, and he was therefore entitled to readmission to the United States upon his return in 1955.

ARGUMENT.

The appellee was admitted to the United States in 1949 as a permanent resident. In 1951, he made application for, and was released from, service in the armed

forces on the ground of alienage. He thereby became ineligible to citizenship. An immigrant, previously lawfully admitted to the United States, returning to the United States after a temporary visit abroad, is classified as a nonquota immigrant (Section 4(b), Act of 1924). A nonquota immigrant could be admitted to the United States, notwithstanding ineligibility to citizenship under the provisions of Section 13(c) of the Immigration Act of 1924.

Stated differently, a permanent resident alien who made a temporary trip abroad could be readmitted to the United States on his return, if otherwise admissible, notwithstanding the fact that he was ineligible to citizenship. He had a non-excludable status so far as eligibility to citizenship was concerned. The 1952 Act does not specifically provide such a non-excludable status. To this extent, we agree with the appellant. The Court below found that this *non-excludable status* was preserved to the alien after the 1952 Act by the provisions of the "Savings Clause" (Sec. 405(a)). This finding of the Court below is the sole issue before this Court.

Appellant, however, has digressed from this issue, apparently through failure to properly interpret the rationale of the decision of the District Court. Appellant quotes the District Court decision as follows:

> "In my opinion, the Savings Clause of the 1952 Act is sufficiently broad to preserve this status (as a resident alien). I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in

> *Paris v. Shaughnessy,* 138 F. Supp. 361 (S.D.N.Y. 1956) relied upon by the Government. The Savings Clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movement of resident aliens who theretofore had been free to leave the United States temporarily and return."

The appellant, in quoting the well-chosen words of the Court below, supplied the following words "(as a resident alien)." Judge Goodman was *not* referring to the status as a resident alien in the quoted paragraph, but was referring to the *non-excludable status* of the appellee. Appellant states:

> "The effect of the decision of the court below in invoking Sec. 405 of the 1952 Act, the Savings Clause, is not to save to appellee a status, but to continue the effect of Sec. 13(c) of the 1924 Act as permitting a nonquota immigrant alien ineligible to citizenship to be admitted to the United States as a nonquota immigrant, notwithstanding the repeal of Sec. 13(c)."

It is true that the "Savings Clause" does continue the effect of Section 13(c) so far as such non-excludability status is concerned. Appellant, however, having supplied his own incorrect interpretation as to the status referred to by the District Court, states:

> "The fallacy of the opinion is one of substitution of terms. Appellee was found to be an 'immigrant alien.' The term 'resident alien' was substituted for that of 'immigrant alien' and a 'status as a resident alien' was then attributed to appellee which the court held was saved. Congress clearly acted to deprive an 'immigrant alien', ineligible to citizenship, who had previously been admitted to permanent residence, of the privilege of reentering the United States as a 'nonquota immigrant' by repealing the statutory authority therefor. No clearer expression of Congressional intent can be suggested."

Appellant disregards the Supreme Court decisions hereinafter discussed, holding that, in the absence of any specific statutory provision, a status under the prior Act is preserved. There is no specific statutory provision in the 1952 Act which would deprive the appellee of his non-excludable status. In fact, the only authority for the exclusion of aliens under the 1952 Act lies in Section 212 which reads in part:

> "*Except as otherwise provided in this Act,* the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:" (Emphasis ours)

Appellant contends the mere failure to include in the 1952 Act an exception for returning resident aliens ineligible to citizenship constitutes an intent to terminate the non-excludable status acquired under the prior statute. Obviously, Congress had no such intention. We submit that Congress was merely preventing aliens from acquiring such non-excludable status by

actions after the effective date of the 1952 Act, and there was no intent, expressed or implied, to deprive aliens of such a non-excludable status acquired under the prior laws.

Concededly, if the "Savings Clause" does not apply, the appellee was properly excluded, but we believe that the language of the statute and the decisions of the Courts relating to the "Savings Clause" overwhelmingly support the decision of the Court below.

In *United States v. Menasche,* 348 US 528, the Court stated:

> "The whole development of this Savings Clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy *not to strip aliens of advantages gained under prior laws.* The consistent broadening of the savings provision, particularly in its general terminology, indicates that *this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."* (Emphasis ours)
>
> *Shomberg v. United States,* (348 US 540).

likewise holds that the "Savings Clause" is all-inclusive, and that, where Congress intended to override the "Savings Clause" because it deemed other considerations more compelling than the preservation of the status quo, it plainly said so in the Act. In footnote 5 of that decision, the Court cites four examples of such exceptions. In the case at bar, there is no such specific exception that would take away plaintiff's pre-

existing right granted by statute, to reenter the United States, notwithstanding ineligibility to citizenship, if otherwise admissible.

As pointed out above, the "Savings Clause" is found in Section 405 of the McCarran Act. Both the *Menasche* and the *Shomberg* cases involved subdivision "b" of the "Savings Clause," which deals with naturalization proceedings, whereas, the case at bar involves subdivision "a", which deals with all other situations. However, the interpretation of the "Savings Clause" found in the cases apply to both subdivisions "a" and "b" with equal force.

United States ex rel. Sciria v. Lehmann, 136 F. Supp. 458,

and the later case of

United States ex rel. Carson v. Kershner, 228 F. 2d 142,

discussed the *Menasche* and *Shomberg* cases as they bear on different situations. The conclusion reached is summed up in the following language of the *Carson* case, at page 146:

> "The Court found that the relevant savings clause in that case was the one contained in Section 405(b). That Section, like Section 405(a), consists of a general savings provision which applies unless 'otherwise specifically provided.' "
>
> * * * * * * *
>
> "The Menasche and the Shomberg opinions thus clearly teach that the savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. *It was held*

> *in the Shomberg case that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause.* No such clear manifestation of intent is apparent in the present case." (Emphasis ours)

We repeat, no such Congressional intent exists in the case at bar.

An additional point in the *Carson* case (at p. 147) deserves mention:

> "Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan v. Phelan,* 1948, 33 US 6, 10, 68 S. Ct. 374, 92 L. Ed. 433."

The same view is expressed a little differently by this Court in the case of *Aure v. United States,* 225 F. 2d 88, at page 90, as follows:

> "Clearly, it is the teaching of the Menasche case and we are satisfied it was the intent of Congress that the savings clause is not limited to cases involving affirmative action and those concerning derivative citizenship, but its preservation feature should be extended to all substantive rights existing at the time the statute creating the rights was repealed. The real test is whether the 'right' which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies."

In the instant case it is pointed out that the appellee's right of reentry is not merely a procedural remedy; it was a substantive right.

Appellant has cited *Paris v. Shaughnessy,* 138 F. Supp. 36. With respect to the District Court's decision in the *Paris* case that only "inchoate rights in the process of termination or acquisition" are saved, attention is invited to the case of

Wong Kay Suey v. Brownell, 227 F. 2d 41,

in which the Court declared (at p. 42):

> "It may be said that the only 'rights' directly referred to in the savings clause are rights 'in the process of acquisition.' But we think this phrase was intended to have a broadening rather than a narrowing effect. Congress can hardly have intended to preserve *only* rights 'in the process of acquisition' and cut off rights 'fully acquired'."

The following cases illustrate some of the situations in which the courts have held that a status of non-deportability under prior law is preserved by the savings clause:

United States ex rel. De Luca v. O'Rourke, 213 F. 2d 759,

held that a non-deportable status gained by *judicial recommendation against deportation* after a narcotics conviction was saved, even though the new Immigration Act makes no provision for such recommendation.

Ex parte Robles-Rubio, 119 F. Supp. 610,

made the same decision, the Court saying at page 613:

> "The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act

> would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects insofar as possible.

United States ex rel. Sciria v. Lehmann, 139 F. Supp. 458,

held that immunity from deportation gained by a *statute of limitations* was preserved, despite a provision of the new Act which seemed to remove the immunity.

United States ex rel. Carson v. Kershner, 228 F. 2d 142,

held that immunity from deportation by a *conditional pardon* was saved.

And the Attorney General has held in a recent Interim Decision (*Matter of J—,* A9 689, 703, Int. Dec. 753, decided February 16, 1956) that an alien who was deportable because he had reentered the United States illegally after a prior deportation, acquired a non-deportable status by a *private bill* enacted by Congress in 1949 and that such status was preserved by the savings clause. The Attorney General rested his decision on the *Menasche* case.

The same principle that governed the foregoing cases should be applicable here. The only essential difference between the cited cases and the case at bar relates to the manner in which the status of non-deportability or non-excludability was acquired. In the cited cases it was acquired by a variety of methods—judicial, statute of limitations, pardon, private bill—

and in the case at bar, it was acquired by legislative enactment; that is, Section 13(c) of the 1924 Act.

In view of the express provisions of the "Savings Clause" that repealed statutes be continued in full force and effect, no reason exists to distinguish this case from the others. As the Court below said, the "Savings Clause" should be applied as was intended—to forestall deprivation of status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that Congress wished to suddenly circumscribe the movements of resident aliens who heretofore had been free to leave the United States temporarily and return.

We agree with appellant that Congress has the power to prescribe terms and conditions upon which aliens may enter or remain in the United States, and we believe that in the enactment of Section 405(a) of the Immigration Act of 1952, Congress exercised that power to preserve, among other things, a non-excludable status which existed prior to the 1952 Act, in the same manner that the various non-deportable statutes involved in the above cited cases were saved.

The court below indicated the fallacy of the decision of the District Court in *Paris v. Shaughnessy,* 138 F. Supp. 36, cited by appellant, stating:

> "In my opinion, the savings clause of the 1952 Act is sufficiently broad to preserve this status. I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the Court in Paris v. Shaughnessy, 138 F. Supp. 36 (S.D.N.Y. 1956), relied upon the Gov-

> ernment. The savings clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under the prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movements of resident aliens who theretofore had been free to leave the United States temporarily and return."

Appellant contends that appellee, as an immigrant seeking admission to the United States, had no rights or status by reason of his prior residence in the United States, and that, to be admitted, he must meet all the requirements of the statutes in effect at the time of his application for admission. We agree that he must meet the requirements of the statutes in effect at the time of his application for admission, but we would point out, as did the Court below, that the "Savings Clause" (Section 405) is a part of the statute which was in effect at the time of appellee's application for admission, and the excluding provision of the statute (Section 212(a)) states:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:"

Furthermore, the fact that the present and prior statutes provide for reentry permits in lieu of immigrant visas for alien permanent residents returning from temporary visits abroad indicates that such

aliens are not treated exactly the same as aliens who have never had a residence in the United States. The decision of the Supreme Court in *Kwong Hai Shew v. Colding,* 344 US 590, makes it abundantly clear that a resident alien returning from a temporary trip outside the United States has a status different from that of an alien who has never been in the United States before. This decision has been followed by the lower courts and by the Board of Immigration Appeals in subsequent cases.

Roggenbihl v. Lusby, 116 Fed. Supp. 315;
In Matter of B—, A9 552, 318 V I.&N. Dec. 712.

CONCLUSION.

We respectfully submit that the Court below correctly applied the law in holding that the appellee had a non-excludable status under Section 13(c) of the Immigration Act of 1924 which was saved to him by the provisions of Section 405(a) of the Immigration Act of 1952, and that the order of the Court below should be affirmed.

Dated, San Francisco, California,
June 5, 1957.

ARTHUR J. PHELAN,
MILTON T. SIMMONS,
Attorneys for Appellee.